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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO DE JESUS CONTRERAS-
MONTROYA,

Defendant and Appellant.

A156008

(Solano County
Super. Ct. Nos. FCR333628,
VCR222692)

Defendant Antonio De Jesus Contreras-Montoya appeals from a judgment following a contested probation violation hearing. His court-appointed counsel has filed a brief seeking our independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) to determine whether there are any arguable issues on appeal. Appellate counsel has represented that he advised defendant of his intention to file a *Wende* brief in this case and of defendant's right to submit supplemental briefing on his own behalf. Defendant did not file any such briefing. (*People v. Kelly* (2006) 40 Cal.4th 106, 124.)

Following our independent review of the record, we issued an order for supplemental briefing addressing defendant's Penal Code¹ section 273.5 pleas and sentences in both case numbers VCR222692 and FCR333628. We also notified the parties of an arithmetic error in the calculation of custody credits awarded in case number VCR222692 and offered them an opportunity to file supplemental letter briefs in order to

¹ All statutory references are to the Penal Code.

object to our stated intention to correct the abstract of judgment. Having considered all supplemental briefing submitted by the parties, we will order a limited remand for the superior court to (1) determine if defendant's sentence was unauthorized in case number VCR222692; and (2) correct the custody credit award for case number VCR222692 reflected in the abstract of judgment. Otherwise, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2014, in Solano County case number VCR222692, defendant was charged with one count of felony corporal injury to a spouse (§ 273.5, subd. (a) ("273.5(a)")) with an allegation pursuant to section 273.5, "subdivision (e)" that within the past seven years defendant suffered a prior section 273.5(a) conviction in Sonoma County.² The charge was filed after defendant slapped his wife in the face causing bruising. Defendant pled no contest to that count and admitted the allegation that he suffered the alleged prior conviction.³ Defendant's plea form reflects he understood his maximum exposure in the case was five years.

² Section 273.5 was amended effective January 1, 2014 to redesignate the enhancement provision at issue in this case from subdivision (e) to subdivision (f)(1) without any other change. (Stats. 2013, ch. 763, § 1.)

³ We note the following exchange from the transcript of defendant's change of plea hearing:

"[Deputy District Attorney] MS. NISPEROS: Your Honor, could the Court inquire if the defendant is admitting the prior allegation as well, which does enhance the sentence?

"THE COURT: You mean the other case? [¶] . . . [¶] . . .

"MS. NISPEROS: 273.5(e) is an allegation that he's committed, been convicted of a 273.5 in the last seven years.

"THE COURT: Yeah. Well, I thought that's all part of Count 1. He's doing that as well, correct?

"[Defense counsel] MR. HELLMANN: Yes.

"THE COURT: Yeah. [¶] . . . [¶] . . .

"THE COURT: . . . Mr. Montoya, to the charges set forth in Count 1, that you, on or about December 2nd of last year, you did commit a violation of California Penal Code Section 273.5(a), what's your plea?

In February 2015, the trial court suspended imposition of a sentence and placed defendant on three years of formal probation. Probation was eventually revoked, and a new felony complaint was filed against defendant under Solano County case number FCR333628. Defendant was eventually charged in this new case by amended information with a felony violation of section 273.5, subdivision (f) (“273.5(f)”). As to this count, it was alleged defendant had two prior section 273.5(a) convictions in the preceding seven years. Defendant was also charged with felony false imprisonment by violence (§ 236). These charges stemmed from an incident in which defendant drove his girlfriend, who was trying to end their relationship, to a location without her consent, stopped the car, got on top of her in the car, grabbed her such that he left marks on her arms, and would not allow her to leave. Defendant eventually got off of the victim, punched her causing a black eye, and threw gravel from the ground at her face. Defendant pled no contest to both counts and admitted he suffered both of the prior convictions. His plea form reflects he understood his maximum exposure in this new case was five years, eight months.

In April 2018, the trial court imposed sentences in both cases. In case number FCR333628, the court asserted it was imposing the “high term” of four years for the section 273.5 count, consecutive to eight months (one-third the midterm of two years) for the false imprisonment count. In case number VCR222692, the trial court imposed a consecutive one-year term (one-third the midterm of three years) for the section 273.5 count. The trial court suspended execution of the sentence and placed defendant on

“THE DEFENDANT: No contest.

“ . . .

“THE COURT: And do you admit that on or about December the 10th, 2013, in Sonoma County, you were convicted of a violation of California Penal Code 273.5(a)?

“THE DEFENDANT: Yes.

“THE COURT: You admit that?

“THE DEFENDANT: Yes.”

probation. Several months later, the trial court formally revoked probation and executed the previously stayed sentence. Defendant appealed, and his counsel filed a *Wende* brief.

Following our review of the record, we issued an order for supplemental briefing addressing defendant's section 273.5 pleas and sentences in both case numbers VCR222692 and FCR333628. We explained the record indicated that defendant's pleas in each case included violations of section 273.5(f), which carries a sentencing triad of two, four, or five years.

With regard to case number FCR333628, defendant acknowledges he was convicted of violating section 273.5(f). He argues that while the court misspoke when asserting it was imposing the "high term" of four years, the sentence was an authorized term for the offense and should be understood as the trial court exercising its discretion to impose the mid-term. The People also acknowledge the trial court's error in misstating four years as the "high term" for the section 273.5(f) conviction, but assert it cannot be corrected because the sentence was an authorized term which became final after it was initially imposed in April 2018 and not appealed from.

Neither defendant nor the People substantively address the plea or the sentence in case number VCR222692, though the People mention that defendant pled no contest to a section 273.5(a) count.

DISCUSSION

With regard to case number FCR333628, the record establishes that the trial court misspoke when stating it was imposing the "high term" of four years for the enhanced section 273.5 conviction. At all relevant times in this case, section 273.5(f) has set out an enhanced sentencing triad of two, four, or five years for any person convicted of violating section 273.5 within seven years of a previous section 273.5(a) conviction. (§ 273.5(f); Stats. 2013, ch. 763, § 1.) That said, we agree with the People that the error is not presently correctable because the sentence imposed was authorized and never challenged. (*People v. Howard* (1997) 16 Cal.4th 1081, 1084; *People v. Scott* (1994) 9 Cal.4th 331, 351–354.)

This, however, leaves unresolved the question of whether the sentence in case number VCR222692 is unauthorized. As discussed above, the complaint, plea form, and transcript of the change of plea hearing all show that when defendant pled to the section 273.5(a) count, he also admitted the allegation that he suffered a prior section 273.5(a) conviction within seven years and acknowledged his maximum exposure in the case was five years. Defendant's *Wende* brief even acknowledges that in case number VCR222692, defendant was charged with a violation of section 273.5 with a prior conviction, and he pled no contest to the charge and admitted the prior. As such, it appears the subordinate term for the section 273.5 count in case number VCR222692 was mistakenly calculated using the sentencing triad for an unenhanced section 273.5(a) offense.

Because neither party substantively addresses the propriety of the sentence in case number VCR222692, out of an abundance of caution, we will remand the case to the trial court with limited instructions to hold a hearing to determine whether the sentence imposed in case number VCR222692 was lawful. If unauthorized, the court must take corrective action; if authorized, the sentence will stand. Thereafter, the clerk of the trial court shall prepare a corrected abstract of judgment to be sent to the Department of Corrections reflecting subsequent changes, if any, to the sentence in case number VCR222692. The abstract must also be corrected to properly reflect that defendant admitted to an enhanced violation of section 273.5 in case number FCR333628 and the four-year term is the mid-term. Finally, the transcript of the hearing executing the sentence shows the trial court awarded defendant 89 days of actual custody credit and 89 days of conduct credit in case number VCR222692, but mistakenly totaled that number to 198 rather than 178. The abstract must be corrected on this point as well.

DISPOSITION

We remand the case to the trial court with limited instructions to hold a hearing to determine whether the sentence imposed in case number VCR222692 was lawful. If unauthorized, the court must take corrective action; if authorized, the sentence will stand.

Thereafter, the clerk of the superior court is ordered to correct the abstract of judgment to reflect: (1) subsequent changes, if any, to the sentence in case number VCR222692; (2) defendant's admission to an enhanced violation of section 273.5 in case number FCR333628 and the four year term is the mid-term; and (3) a total award of 178 days of custody credits in case number VCR222692. The clerk shall send a certified copy of that amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

Fujisaki, J.

WE CONCUR:

Siggins, P. J.

Wiseman, J.*

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* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.